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OFFICE OF PETITIONS

In re Application of :
Itakura, et al. : DECISION ON PETITION
Application No. 10/796,826 :
Filed: March 9, 2004 :
Atty. Dkt. No.: JCLA21100 :

The above-identified application has been forwarded to the Office of Petitions for consideration of the petition to withdraw the holding of abandonment under 37 CFR 1.181 filed February 7, 2007.

The petition under 37 CFR 1.181 to withdraw the holding of abandonment is hereby **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181." This is not a final agency decision.

This application became abandoned October 18, 2006 for failure to timely submit a proper reply to the non-final Office action mailed July 17, 2006. The non-final Office action set a three month shortened statutory period of time for reply. Notice of Abandonment was mailed February 5, 2007.

Petitioners argue non-receipt of the Office action mailed July 17, 2006. Petitioners further argue that the Office action was mailed to an incorrect change of correspondence address, a changing of correspondence address having been properly submitted.

In the absence of any irregularity in the mailing of the Office action, there is a strong presumption that the Office action was properly mailed to practitioner at the address of record. This presumption may be overcome by a showing that the Office action was not in fact received. The showing required to establish non-receipt of an Office communication must include a statement from the practitioner stating that the Office communication was not

received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. See, MPEP 711.03(c). The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office communication may have been lost after receipt rather than a conclusion that the Office communication was lost in the mail.

Where an application becomes abandoned as a consequence of a change of correspondence address (the Office action being mailed to the old, uncorrected address and failing to reach the applicant in sufficient time to permit a timely reply), petitioner is required to establish that due care was taken to adhere to the requirement for prompt notification in each concerned application of the change of address (See, MPEP 601.03), and must include an adequate showing that a timely notification of the change of address was filed in the application concerned, and in a manner reasonably calculated to call attention to the fact that it was a notification of a change of address. See, MPEP 711.03(c).

The non-final Office action was mailed July 17, 2006. A revocation of power of attorney was received July 20, 2006. Petitioners argue that the revocation of power of attorney bore a certificate of mailing address of July 17, 2006, the date that the non-final Office action was mailed and that as a result of the properly submitted revocation of power of attorney, the holding of abandonment should be withdrawn.

In accordance with 37 CFR 1.8(a), "[e]xcept in the situations enumerated in paragraph (a)(2) of this section or as otherwise expressly excluded in this chapter, correspondence required to be filed in the U.S. Patent and Trademark Office within a set period of time will be considered as being timely filed if the procedure described in this section is followed. **The actual date of receipt will be used for all other purposes.**" (Emphasis added.)

The revocation of power of attorney was actually received on July 20, 2006. Accordingly, Office records indicate the Office communication was properly mailed to the correspondence address of record at the time of mailing. Accordingly, there was no

irregularity in mailing the Office communication on the part of the United States Patent and Trademark Office.

The specific rule for obtaining a filing date as of the date of deposit in rather than the date of receipt at the Office is 37 CFR 1.10. There is no indication that petitioners utilized the provisions of Rule 10 in submitting the revocation of power of attorney. Accordingly, the revocation of power of attorney is deemed received July 20, 2006, subsequent to the mailing of the non-final Office action.

ALTERNATE VENUE

Petitioner may wish to consider filing a petition stating that the delay was unintentional. Petitioner's attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable". An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By facsimile:

(571) 273-8300

By hand delivery:

U.S. Patent and Trademark Office
Customer Window, **Mail Stop Petition**
Randolph Building
401 Dulany Street
Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to
the undersigned at (571) 272-3205.



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Office of Petitions